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THE INITIATION OF LEGISLATION

I.

The theory of the separation of powers holds a prominent place in American political philosophy. That legislative, judicial, and executive functions should be carefully distinguished and entrusted to agents quite independent of each other, has been more or less the aim of our constitution-makers, and has been generally approved by thinkers and writers upon our political institutions.

But what, precisely, does this theory affirm? Its earnest advocates have always held that it is against the interests of liberty for any two of these elementary functions to be performed by the same person; but there have always been those who have seemed to believe its true meaning to be that no person who performs one of these functions shall influence or even in any way participate in, however remotely, the performance of either of the other two. This extreme form of the principle is generally associated with criticism of some public official who is being charged with acting outside of his legitimate powers; or else it is invoked in answer to some reformer who is urging further political adjustment with a view to closer coöperation between the legislative and executive departments in their relation to the initiation of legislation.

It is this second attitude toward the doctrine of the separation of powers which lies at the base of much of the criticism incurred of late by President Wilson. One of his political opponents declared in the United States Senate recently that every measure

of general interest, except the tariff bill, since the beginning of his administration, had been initiated in the White House or in the office of one of his cabinet. "Somehow," he said, "the spirit of our institutions has been transformed and the legislative branch of the government has become a mere recorder. What the President really wants is a journal clerk instead of a Congress. As a legislative body we have for the time being passed out of existence." Of course there is some spite and some partisanship in this statement; but it probably would not have been made had not the speaker felt able to count upon a widespread conviction that any President's activity in such matters must be contrary to the fundamental principles of our government.

To a less explicit, but no less real, adherence to such a view is due the fact that Mr. Wilson has been severely criticized for following the example of Washington and Adams in addressing the Congress in person instead of sending them written messages, as though the former method were less of an interference with the complete liberty of the law-making body. The fact is likely to be overlooked that he is only reviving the custom originally followed by Washington and Adams. It was Thomas Jefferson who began the custom of sending messages, and that not because of any theory of the separation of powers but simply because he was an indifferent speaker and disliked to make public addresses. His practice became a custom through its imitation by Madison and Monroe, his faithful followers; and the custom has been retained because of inertia, and consecrated by that amusing conservatism so apt to prevail in political and ecclesiastical trifles. A quaint manifestation of it is referred to in Mr. Roosevelt's complaint that senators object to his sending his messages to them in print and were disposed to insist that he write them out in manuscript. His rejoinder is characterestic of that aggressive executive: "Whether I communicate with Congress in writing or by word of mouth or whether I write them by a machine or a pen are equally and absolutely unimportant matters. The importance lay in what I said and in the heed paid to what I said." An abrupt way of defending the executive's power of initiation; but the provocation was doubtless great and persistent.

In this connection it would be interesting to hear Mr. Roosevelt's views more fully expressed. After having spoken of the difficulties of a President's position, he said: "Gradually I was forced to abandon the effort to persuade them to come to my way, and then I achieved results only by appealing over the heads of the Senate and House leaders to the people who were the masters of us both." He seems to express here the theory attributed to him in the *North American Review* when a writer in speaking of the powers of the President: first, to execute the laws, and second, "to recommend to the consideration of the Congress such measures as he shall judge necessary and expedient," said, "To this duty he [Mr. Roosevelt] has added a third, to influence public opinion in the present . . . . he not only executes the laws, he contributes to their making. He is both President and Prime Minister, the chosen head of the people and the acting head of the party."

Turning from the presidency to the governorship of our leading state, we find Governor Hughes probably the most distinguished example of insistence on the part of the governor that the best reasons must rule and that the executive has a perfect right to present his reasons forcibly why laws should not be enacted. "From the first days of his term of office at Albany he made it clear that his policy would be to seek from the legislature the passage of needed laws, but if this was refused, to go behind the legislature and appeal directly to the people. He followed this plan last year with the result that the obstinate legislature finally crumbled up meekly before him." This statement from *The Nation* is unhappy and likely to provoke those who in theory oppose such executive action to say, as did a writer in *The Independent*, "Thus Governor Hughes terrorizes and coerces the legislature."

In the case referred to, the governor acted well within his legal and constitutional rights. He was particularly concerned about the suppression of race-track gambling. The gambling fraternity was backed by an unlimited purse and supported a powerful lobby. The reformers who were fighting the evil were unorganized, inefficient, unpractical, and pretty sure of defeat if unaided by the governor. The legislature, at its regular session,

failed to enact the requisite anti-gambling laws. The state constitution provides that the governor may summon the legislature in special session and may limit its deliberations to those matters which are recommended to it by him. Governor Hughes therefore called back the legislature in special session and placed this one question so prominently before it that action was unavoidable. No one familiar with public affairs in the state was ignorant that there was a "fight" going on between the governor and the legislature about a matter of legislation. No one doubted the public demand for affirmative action. The shallower apostles of the separation of powers could easily be persuaded that in such a conflict there was danger to the spirit of our institutions. Practical citizens, however, spoke their minds to their representatives in no uncertain terms. The anti-gambling bill was passed. No one doubts that Governor Hughes forced the legislation through over the passive opposition and obstructive tactics of a majority of the legislature. The gamblers and the professional politicians raised the cry of "executive usurpation," but I believe it was never seriously proposed that this usurpation be tested by formal impeachment. It was only the "spirit of the constitution" that the governor had violated.

Some of the gentlemen who will exert considerable influence over the coming Constitutional Convention in New York State have expressed a hope that the convention will provide in the new constitution for some coöperation between the governor and the legislature. They suggest that the governor be authorized to go into the legislature with a drafted bill, defend it on the floor of the chambers, answer such questions as the members wish to put to him as to its desirability and practicability, and then require a vote upon it within a reasonable length of time. They do not ask for any exclusive control by the governor over the initiation of bills, or that he take any such part in the actual enactment of laws as he would take if he were empowered to vote. There is no thought of giving him any sort of control over the will of the legislature. What is the demand of these gentlemen? Simply that he be permitted to appeal to the reason of the lawmakers, and to ask that they

frankly express their decision without confusion or concealment. It is the power of initiative alone that is had in mind. That is not an exclusive power. When the proposal was presented to the public some time ago in an academic discussion, several metropolitan papers referred to it as the dream of amateur constitution-makers. Editors wanted to know whether we were prepared to give up the splendid government bequeathed by our forefathers.

In this paper I address those of our fellow-citizens who really fear some unfortunate result from such overstepping of the line of separation of powers, some weakening of our constitutional system. My purpose is to show that critics are too apt to put an extreme interpretation on the doctrine of the separation of powers. They demand that it be carried out as it never has been carried out with success in any country,—as it was not meant to be carried out by "the fathers," and as the best reasoning prompts one to believe that it cannot be carried out without unfortunate consequences. In discussing the matter I shall present the origin and promulgation of the doctrine in the writings of Montesquieu; the relation of it to the organization of our constitutional system in America; the unfortunate results of its too rigid application in France; and the present result of its too rigid application in our system.

To discuss a theory of this sort impartially nearly always brings down upon the discusser the condemnation of both its advocates and its opponents. There is no doubt that much good has been done through a limited application of the theory. There is equally little doubt that whenever statesmen have followed it to a logical extreme they have been led into calamity. One might compare it to the theory of the division of labor. Industrial organization could never have reached its present high state of development without some application of this principle. Its too logical and detailed application, however, now tends to destroy the very human units upon whose welfare industrial prosperity depends. Despite the difficulty of walking this narrow way of compromise, I hope to be able to show that the separation of powers may be the guide to the security of liberty, and yet, if too slavishly followed, also the shield of corcuption and inefficiency.

II.

The origin of the idea of a separation of legislative, judicial, and executive powers is attributed, and justly, to Montesquieu, and it doubtless resulted from his study of the English government. It is true that Aristotle recognized a division of political powers as a convenient analysis, and discusses them separately in his *Politics*; but he makes no argument for a separation of them. Locke, who published his famous *Two Treatises on Civil Government* in the year of Montesquieu's birth, 1689 (just a century before the extreme application of the doctrine in France) goes a step further. He says of the doctrine: "In well-ordered commonwealths, where the good of the whole is considered as it ought, the legislative power is put into the hands of divers persons who, duly assembled, have by themselves, or jointly with others, a power to make laws, which, when they are done, being separated again, they are themselves subject to the laws which they have made; which is a new and near tie upon them to take care that they make them for the public good.

"But because the laws that are at once, and in a short time made, have a constant and lasting force, and need a perpetual execution, or an attendance thereupon, therefore it is necessary that there should be a power always in being which should see to the execution of the laws that are made, and remain in force. And thus the legislative and executive power come often to be separated."

Montesquieu was a nobleman of unusual opportunities and powers who gave a large part of his life to travel, study and reflection. He was a philosopher, and his *Spirit of Laws*, in which our doctrine received attention, is his greatest work. To it all students of political science turn; from it proceeded an impulse, the results of which can be accounted for only by reference to the sensitive epoch in which it was given. Rationalism was then the order of the day. Men tested all problems by abstract reason. Rousseau and his followers ignored precedent, experience, custom, habit; or swept them aside with the grand gesture of our modern theorists; crying, "Facts! experience! what have I to do with these? I have a grand idea."

Montesquieu was wiser than his generation, and drew his notions from the real world. He wrote of what he saw around him. He sought for better government as actually manifest in practical politics, not in abstractions. "One nation there is also in the world," he says, "that has for the direct end of its constitution, political liberty. We shall presently examine the principles on which this liberty is founded; if they are sound, liberty will appear in its highest perfection. . . . . To discover political liberty in a constitution, no great labor is requisite. If we are capable of seeing it where it exists, it is soon found, and we need not go far in search of it." He found it in the English system of government. He described it as follows:—

> The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted that one man need not be afraid of another.
>
> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Our author wrote so epigrammatically and so briefly that it is somewhat difficult to determine his exact meaning. To do so we must examine the environment in which he lived while in England. Does he mean that in England these powers were separated by a line so sharply drawn that no coöperation between the organs of government was possible? I think not. Let us inquire.

Montesquieu was in England from the autumn of 1720 until the spring of 1731 — a part of a transitional period in English constitutional history. One is disposed to think all periods of constitutional history transitional; but this one is particularly elusive, and there is considerable difference of opinion among the best observers as to its real nature. Walpole was just reaching the height of his power. Townshend, his chief rival, was turned out of the ministry in 1730, and in 1733, at the time of the excise row, Chesterfield followed Townshend. There can be no doubt that Walpole was the real ruler of England during

Montesquieu's visit; and that he, Walpole, had the Commons with him. It may be true, as Dr. Johnson said, that "Walpole was a minister given by the king to the people; Pitt was a minister given by the people to the king"; but ministerial government was rapidly taking shape in England under the very eyes of the Georges who could not see it, and would have contested its every step had they seen it. It must have been pretty well on its way, moreover, when a man of the temperament of George II could say to a minister as he did to Walpole, "I will order my army as I see fit; for your scoundrels of the House of Commons, you may do as you please; you know I never interfere, or pretend to know anything about them."

But the evolution was still far from complete. Although the title Prime Minister was often applied to Walpole, it was applied not with respect, but rather in irony, and he objected to it most strenuously, with the shrewdness of an Augustus. He did not govern by his position of first minister; he governed, and he knew it, by weight of ability and personal favor,—aided no little by corruption.

Now it is a very common remark that Montesquieu did not understand his England, and this statement is based on the fact that he did not describe a parliamentary executive. Mr. Collins thinks Montesquieu "was evidently ignorant of the tactics of Walpole and could hardly have been behind the scenes in English politics." Mr. Dicey says "Montesquieu misunderstood on this point the principles and practice of the English constitution." One does not lightly suggest that Mr. Dicey is in error in a matter of English constitutional history, but one is certainly confused by an array of facts which seems to contradict his statement. If one concedes that Montesquieu was in error, one must say the same of Blackstone, who, writing about the year 1758, says, "With us, therefore, in England, this supreme power is divided into two branches: the one legislative, to wit, the parliament, consisting of king, lords and commons; the other executive, consisting of the king alone." This Mr. Dicey calls a "lawyer's view" in antithesis to the view of the practical politician.

Montesquieu evidently thought he was describing a state in

which there was some separation of powers. Evidently some of his contemporaries, and these no superficial observers, thought as he did. In theory, at least, there was then a considerable separation of powers. But the fact is that Walpole was permitted by the king to direct the legislation of the realm. Two different views are here possible. Montesquieu was either mistaken in his observations, and really meant that a complete separation of powers is in general a necessity, basing this upon the theory as held in England; or he meant that a partial separation was desirable, basing his views on the facts.

Whatever were his views on this matter, we cannot accept them as inspired, for we should certainly decline to accept some of his other views. He provides for an upper chamber of the legislature with only hereditary nobles, forming "a body that has the right to check the licentiousness of the people." He holds that "The executive power ought to be in the hands of a monarch [presumably hereditary]; . . . . the legislative power ought not to have the power of arraigning [impeaching] the person, nor of course, the conduct of him who is entrusted with the executive power. His person should be sacred, because it is necessary for the good of the state to prevent the legislative body from rendering themselves arbitrary. The moment he is accused or tried, there is an end of liberty." One is almost amused, in the light of recent political evolution, to find him saying, "Were the executive power to determine the raising of public money, otherwise than by giving consent, liberty would be at an end because it would become legislation in the most important point of legislation." Limited monarchy was his ideal; with democracy he had no patience.

It is manifest that Montesquieu grasped clearly Aristotle's idea of division of powers. His philosophical mind developed a system in which these powers should be separated from each other. He doubtless read Locke; he observed closely the conditions which surrounded him, and thought he had found a separation of powers more or less consistently effected. There is no doubt of the truth of his statement that "There would be an end to everything, were the same man, or the same body, whether of the nobles or of the people, to exercise these three

powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of the individuals." This fundamental and simple doctrine was taken up and spread abroad by the multitude of pamphleteers of the latter half of the eighteenth century; it became more sacred than the divine commandments, and found its pharisees as unreasoning and formal as any other commandment.

III.

So much for the origin of the doctrine. Now let us turn to its practical application. I would emphasize the word practical, because later on we shall have to refer to its unpractical application and its abuse. As we have indicated, the doctrine is just as useful in the field of politics as is that of the division of labor in the field of economics. Both doctrines are hurtful if applied with too determinate and logical consistency. One finds in America the first practical application of the theory. Whatever separation of powers Montesquieu may have found in England, it was not the result of any theory or the application of any abstract principle. The English government is further from logic than from anything else; its apostles are pragmatists, not to say opportunists, and they do what the practical affairs of the day demand with businesslike readiness and adaptability. In France the doctrine had secured foothold enough before its adoption in America, but only among theorist. The ferment that finally burst into eruption in 1789 was until that year kept in the realm of speculation by a centralized, unified, almost absolute, monarchy. It was to England and to the United States that France looked in 1789 for examples of the application of the doctrine.

America had in the period from 1776 to 1789 become a veritable experiment station of political principles and theories. At least fourteen new governments had been set up, and several of these had already undergone changes after the first experiment. In this process English and colonial practical experience had been somewhat weirdly mingled with French dogma and theory. Some Americans held that the English government was characterized even in that day by a separation of powers,

and the French expression of the arguments in favor of such an arrangement entirely overcame any objection some of the early patriots may have had to following in this respect the supposed example of the mother country.

We must not suppose, however, that such spirits as John Adams, Hamilton, Madison and Jefferson, were slavishly following any leadership but that of their own intelligence, though the power of this guide may have been often weakened by prejudice, misinformation, conventionality, and unwarranted theory. Though Jefferson was in France when the Federal constitution was drafted, he had a considerable part in shaping the Virginia constitution, and through that the later course of American politics. All of these men were scholarly statesmen of the first rank, and were giving their best thought to public affairs. On the one hand they quoted great authorities freely in support of their views; on the other they exposed the errors of these same authorities when the facts and the authorities differed.

John Adams speaks of the "great Montesquieu" only to show that his idea of the subserviency of citizens to the army is not in accordance with thc facts. Again he says, "I am not an explicit believer in the inspiration or infallibility of Montesquieu," but goes on to place him above any of his critics, second only to Voltaire in intellect. And in his learned *Defense of the Constitutions of Government of the United States of America* he quotes a large part of Montesquieu's account of the English government. Jefferson, on the other hand, writes to his friend de Tracy in France, "I had, with the world, deemed Montesquieu's work of much merit, but saw in it, with every thinking man, so much of paradox, or false principle and misapplied facts, as to render its value equivocal on the whole." In a much earlier letter he ranks Montesquieu's *Spirit of Laws* for the science of government, and Adam Smith's *Wealth of Nations* for political economy, as the best works in either field. He calls attention to the fact that the former treatise "contains indeed a great many political truths, but also an equal number of heresies, so that the reader must be constantly on his guard." Hamilton in his notes comparing the British constitution with others, calls it "the best form," and cites for reading Aristotle, Cicero Mon-

tesquieu and Necker. In another place he advises that Grotius, Puffendorf, Locke, Montesquieu, and Burlemaqui be read, saying that he would mention others, but "one who attends diligently to these requires no others."

Such men introduced the theory of the separation of powers into our system of government. John Adams expressed their view very well when he says: "When a writer on the government despairs, sneers, or argues against mixed government, he instantly proves himself an ideologian. To reason against a balance, because a perfect one cannot be composed or eternally preserved, is just as good sense as to reason against morality because no man has been perfectly virtuous." Two points should be noted particularly in this statement. First, his interest is in a balancing of forces against each other, not in the separation of them; and secondly, he recognizes that a complete application of any theory is out of the question. He argues that the executive should be elected by the people directly rather than through the legislature, in order that the legislature may not control him, but does not bother to cite any theory to support this practical demand. The fear throughout seems to be of the control by the legislature of the executive rather than the reverse. Montesquieu, like Hamilton, of course, believed in a limited monarchy as the only means of protecting the executive and avoiding mob rule.

To go into a detailed discussion of the application of the doctrine in the state constitutions as an evidence of the practical view taken of it by their framers is unnecessary. Madison in *The Federalist* has shown that "notwithstanding the emphatical and, in some instances, the unqualified terms in which the axioms have been laid down, there is not a single instance in which the several departments of government have been kept absolutely separate and distinct. New Hampshire, whose constitution was the last formed, seems to have been fully aware of the impossibility and inexpediency of avoiding any mixture whatever of these departments, and has qualified the doctrine by declaring 'that the legislative, executive and judicial powers ought to be kept as separate from, and independent of, each other as *the nature of a free government will admit: or as is consistent with*

the chain of connection that binds the whole fabric of the constitution in one indissoluble bond of unity and amity." [His italics.]

Virginia probably was under the influence of Jefferson in 1776 when she declared that "The legislative, executive, and judicial departments shall be separate and distinct, so that neither exercise the powers properly belonging to the others"; yet, as Madison points out, the executive and council are appointed by the legislature; and there are other exceptions to a consistent separation of powers. New York provided about the same time for a council of revision of legislation, which was practically a third house composed of the governor and several judges; and for a council of appointment composed of the governor and several senators, thus particularly eliminating all lines of separation in the sense in which the word would be used by some.

When we come to the Federal convention of 1787 we find the same respect for a valuable principle and the same practical view of the limit to which it is wise to follow it. Almost at the opening of the convention is was "*Resolved*, That a national government ought to be established consisting of a supreme legislative, judiciary and executive." Yet at about the same time it was proposed by Madison and others that there be a council of revision composed of a "convenient number of the national judiciary" to have a suspending veto. A reading of Mr. Farrand's documents on the Constitutional Convention reveals much more interest on the part of its members in a balancing of powers for practical safety than in any theory of separation as a panacea for political ills. Madison, arguing against a theoretical view, says: "In England, whence the maxim itself has been drawn, the executive had an absolute negative on the laws; and the supreme tribunal of justice (the House of Lords) formed one of the other branches of the legislature."

After the Federal convention adjourned and the new constitution was published, Madison tells us that it was attacked on account of "its supposed violation of the political maxim that the legislative, executive, and judiciary departments ought to be separate and distinct. In the structure of the Federal government, no regard, it is said, seems to have been paid to this

essential precaution in favor of liberty. The several departments of power are blended in such a manner as at once to destroy all symmetry and beauty of form, and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of other parts." He goes on to say that "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . . may be pronounced the very definition of tyranny"; but he then undertakes an elaborate argument to show that in the Federal government the doctrine is not violated, because no two of these functions are performed *exclusively* by any one person or group of persons. "On the slightest view of the British constitution we must perceive that the legislative, executive, and judiciary departments are by no means totally distinct from each other." He says that Montesquieu, to whom he gives all credit for the doctrine, "did not mean that these departments ought to have no *partial agency* in, or *control* over, the acts of each other," but dreaded only that the same monarch both enact and enforce laws.

Madison probably represents more clearly than does anyone else of his time the best thought on the Federal constitution and the political philosophy of the best thinkers of his time. He was not a forceful man; all his results were gotten by a generous reasonableness and an extensive control of facts. He has been called the Father of the Constitution. He was for some time an ally of Hamilton in securing its enactment; later he became his opponent in an effort to preserve it inviolate. This may justify the fame. His middle postition between the extremes of the pure democracy of Jefferson, on the one hand, and the centralized monarchy of Hamilton on the other, suggests the position of Justice Story, who was appointed to the Supreme Court by Jefferson, but soon became the intimate of Marshall, the arch Federalist. Story's view of the application of this doctrine in American polity is doubtless as reliable as that of any man. In his *Commentaries* he says: "When we speak of the separation of the three great departments of government and maintain that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not to affirm that they must be kept wholly and entirely separate and distinct and

have no common link of connection or dependence the one upon the other in the slightest degree. The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments, and that such exercise of the whole would subvert the principle of a free constitution."

We find this view echoed throughout our history. Daniel Webster says that the organs should be kept as distinct as the practical conduct of the affairs of government will permit. What does the politician in the opposition say? That the President or Governor is leading the legislature around by the nose and breaking down the constitution, if he appeals to the public to judge whether he or the legislature, with which he is at odds, is making a real effort to live up to preëlection understandings, and to conduct the government in the interest of the whole people.

IV.

We have seen the origin of the doctrine in England, where it was born of Montesquieu's study of that government. We have reviewed its practical application in America. Now we come to the use of the doctrine under the stress of revolutionary conditions in France. It must be remembered that we did not have a revolution in America; we had a civil war. We separated from Great Britain; but we changed our form of government very little. In 1789 France was led by theorists with almost no experience in self-government; men who, as Arthur Young said, seemed to think there was a receipt for making constitutions. They believed that the time had come to make a government that would preserve liberty and dispense justice, the latter consideration being secondary. They were like the young Chinese as Professor Goodnow describes them, convinced that a perfect government can be thought out. They were determined to have it, precedent or no precedent. Professor Léon Duguit has made a careful study of the application of this doctrine in France from 1789 to 1791 and finds that it was evolved under the combined influence of Montesquieu, the American and the English constitutions; about none of which the leaders seem to have been sufficiently informed.

While some of the American constitutions were drafted with fear of monarchy before the eyes, the Federal constitution-makers had in view rather a tyrannical majority, and the need of protecting order and property. The convention of 1787 was therefore concerned with protecting the executive from the legislature. In France, on the other hand, the movement for reform originated in revolt against the king, and the concern in the period we are considering was to weaken the executive in the advantage of the legislature.

Despite the advice of the wiser ones like Mirabeau and the disciples of Montesquieu, who wished nothing more radical than a limited monarchy of the English type, the National Assembly, in separating the powers, took most of them from the king, thus leaving him nothing but the power of suspending legislation for six months. "The ministers were invested with supreme executive authority, but more regulations were made to insure their responsibility and limit their actual power than to define their functions." The whole administration became merely the clerks of the legislature. There was no provision for coöperation or mutual helpfulness. Mirabeau and his sympathizers made an effort to secure the formation of a ministry on the English model, but the Assembly answered with a provision that no deputy might accept office in the ministry while a deputy or within three years thereafter. (Mr. Morley in his *Life of Walpole* calls attention to a similar provision in England which was but short-lived.) With this all hope of stemming the tide of anarchy was gone. The legislature passed into weaker and less intelligent hands. Its power was used, as is that of an unguided legislature generally, without either wisdom or moderation. The logical consequences resulted,—the leadership of the demagogue from without the government, and finally absolutism.

Again in 1848 the French tried to set up a complete separation of powers. A president and a legislature were elected, each for four years. The traditions of France this time threw the weight of public opinion in favor of the president, who was a demagogue, fortified by the Napoleonic idea. Seignobos compares the system with that of the United States, showing that French conditions and character make even as much separation of powers

as we have undesirable for France. The empire of the third Napoleon soon followed. Not until 1875 did France arrive at a tolerable solution of her constitutional problem. Then she took many of the essentials of the English govermment, which she had at first had in mind, to follow. She set up what was essentially a limited monarchy, with the president as king. All his public acts must be performed by responsible ministers, as in England. But even then the executive was not satisfied to accept the system. McMahon's effort to govern without a majority was needed to show that the real power is always in the hands of the legislature. Thereafter it is of the minister, not of the president, that the historian speaks. In 1887 even the president, Grévy, was forced to resign by a legislature with which he was unpopular. The same fate is said to have befallen Casimir Périer in 1894. France no longer fears the executive. Will the time come when she must guard against the excesses of the legislature? At least she has shaken from her shoulders the incubus of what Duguit so truly says is a "vaine et artificielle théorie de la séparation absolue des pouvoirs." The doctrine of a rigorous division of powers has been (in France) thoroughly condemned by those two sad but conclusive experiences. "The régime of the Convention, the tyranny of the Assembly are the necessary consequences of the separation of powers."

The complete separation had failed in England as self-government arose, but in England the change from it was so gradual during the reigns of the three Georges that it was scarcely perceived. It is gone forever. It brought on France two great political calamities, and was then repudiated for good and all, the coöperation of the English system being substituted. Let us now return to the results of its application in America, in so far as those results present themselves.

Ours is a government of checks and balances. Under the leadership of men of conservative temperament our constitutions, both State and Federal, have been drafted to prevent ill-considered action on the part of the political leaders or majorities. The division of powers has been recognized as the basis for setting up these checks and balances between the several departments, but no very rigid separation exists in practice,

The fundamental doctrine of our government as applied by men of the type of Madison, Story and Webster, is that it is not safe to permit one person to make a law controlling other persons, and then himself enforce it against them. We maintain that it is still useful for us to so arrange political authority that one body of persons shall make general rules of conduct and then, as Locke says, go about their business knowing they must live under the rules they have made. One is reminded of the protectionist statesman caught smuggling at the port of New York. After these general rules of conduct are made, there must be a body of judges, free, independent, non-partisan men, carefully selected, who shall apply these general rules made by the legislature, to the concrete cases and disputes which occur. Then the executive — still another set of men — shall see that the laws thus made and interpreted are carried out. Only with this sort of separation can we be sure of liberty. But we have always bridged this separation to prevent isolation. The governor or president may recommend legislation and is applauded by most right-minded men when he invokes public opinion to decide whether he or the legislature is right. He may also veto bills which do not suit him. The court may check the legislature when it makes laws which are contrary to the constitution which authorizes their enactment. The legislature ratifies the executive's appointments and participates with him in the war power and in the making of treaties, as well as performs the judicial function of trying impeachments.

Now we ask for a further bridge in order that government may be made better, and may tend less to the extremes under which France has suffered. We contend that the executive and the legislative departments are particularly supplementary to each other. The legislative function is a deliberative one and needs the concert of many minds. This is for the acceptance and ratification of legislation, for the expression of the popular will. But legislation is made up of three elements,— initiation, drafting, and ratification. The last should never be done by any other organ than the legislature. But the initiation can be done by anyone, from the humblest citizens to the President of the United States. Now if anyone may initiate, why may one not

do so in a frank and practical way on the floor of the house of Congress or legislature as well as through a message? Are the legislators cowards, or such "a feeble folk" that they cannot face one man and resist his will or charm? If he may initiate, why may he not bring in a bill which explicitly states what he wishes to say and permit the legislators to ask him questions about it? Should any honest legislator hesitate to answer by a vote "yes" or "no" to such a bill brought in by a man who carries for the people a great responsibility? Of whom would they be afraid; of the man who is the executive; of their constituents; or of their consciences?

I have said that the legislature and the executive are supplementary. It is doubtless well that the senate must confirm appointments, though very stupid things are often done by the senators with this power. It is a deliberative check on thoughtless or too radical executives. It is well that the reason of a group effect this check. So is it well that the executive be permitted to galvanize the somewhat unorganized legislature into action, but not to control that action. The executive is the conspicuous head to whom the people look. It is his administration that is called a failure if no good legislation is enacted. He alone is the representative of the whole body of the people. He is the will of the party, as the legislature may be said to be its reason. The will must lead, the reason check. The will would appoint, the reason ratify; the will would propose a law, the reason accept or reject it.

Who are the opponents of this proposal that the executive perform this important function? Mainly the politicians, and generally those in the opposition. It is plain that legislation will have leadership. It is plain that party organization directs our affairs, and there is as yet no substitute for its direction. It is therefore plain that the legislature will be directed by the force which directs the party. Therefore it is plain that either the executive or the party boss will be the initiating force in important legislation, for its production or its prevention. And therefore, if the executive and the party leader are different persons, the executive cannot get to the legislature directly; his initiative must pass through the political organization at the will of the boss.

One is disposed to follow the example of Montesquieu and turn to the English government for an illustration of the needed organization. There the executive is the party leader, or the leader becomes the executive. The person with power is shouldered with responsibility, or the person with responsibility also has the power. The king needs as leader, the commons need as leader, the only person whom the majority will follow; the great leader with all the wires in his hand is made the executive. The initiative is his.

EDGAR DAWSON.

Washington, D. C.

ERRATUM

By an oversight, the address of Mr. Dawson is erroneously given herein as Washington, D. C., when it should have been New York City.